

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

NABEEL NAIEM SLAIEH and  
JOANNE FRALEIGH,

Plaintiffs,

v.

LARRY D. SIMONS,

Defendant.

Case No.: CV 17-1404-AB (FFMx)

**ORDER AFFIRMING  
BANKRUPTCY COURT'S  
DISMISSAL OF APPELLANT'S  
COUNTERCLAIMS [9]**

Before the Court is Appellants Nabeel Naiem Slaieh and Joanne Fraleigh's ("Appellants") appeal from the bankruptcy court's June 28, 2017 order granting with prejudice Defendant Larry D. Simons's Motion to Dismiss. (Dkt. No. 9; *see also* Defendant's Excerpts of Record ("DER") Ex. 177.) Having reviewed the parties' briefing and the record before the bankruptcy court, the June 28, 2017 order is **AFFIRMED**.

**I. BACKGROUND**

Appellant, the debtor in the underlying bankruptcy proceeding, filed a voluntary petition for relief under Chapter 7 of Title 11 of the United States Code on December 18, 2013. (DER Ex. 22.) That same day, the bankruptcy court appointed Larry D.

1 Simons as Chapter 7 trustee (“Trustee”) of Appellant’s Estate. Among the assets in  
2 Appellant’s bankruptcy Estate was his principal residence located at 40834 Baccarat  
3 Road, Temecula, California (the “Property”). (DER Ex. 22 at 35.)

4 Pursuant to his statutory duties to liquidate assets of the Estate, the Trustee  
5 marketed the Property for sale. *See* 11 U.S.C. § 704(a)(1). A buyer was found, and  
6 on April 6, 2016, the Trustee filed a Sale Motion with the bankruptcy court, seeking  
7 authority to sell the property for \$635,000. (DER Ex. 97 at 3,512–3,898.) The  
8 bankruptcy court entered an order granting the Sale Motion on May 26, 2016. (DER  
9 Ex. 129 at 4,689–93.) Appellant appealed the Sale Order to the United States District  
10 Court and filed a motion to stay the case pending appeal in both the district court and  
11 the bankruptcy court. Both motions to stay were denied. (DER Exs. 137, 146.) The  
12 appeal of the Sale Order was later dismissed for failure to prosecute.

13 On July 13, 2016, the United States Marshals Service posted a notice to vacate  
14 at the Property, instructing all occupants to vacate by July 20, 2016, at 12 p.m. (DER  
15 Ex. 148 at 7,058.) On July 19, 2016, Ms. Fraleigh, Appellant’s wife, filed a complaint  
16 in the Superior Court of California, County of Riverside, for quiet title, declaratory  
17 and injunctive relief, and violation of California Business and Professions Code  
18 section 17200 et seq. (DER Ex. 148 at 7,022–7,124.) She also sought a temporary  
19 stay of the eviction proceedings. (*Id.*) Ms. Fraleigh claimed that the sale could not  
20 proceed because Appellant transferred the Property to her via interspousal transfer  
21 deed, recorded on or about May 11, 2016. (*Id.* at 7,055–56.) In opposition, Trustee  
22 argued that this purported transfer was without the bankruptcy court’s approval, and  
23 constituted an unauthorized post-petition transfer under 11 U.S.C. § 549. However,  
24 over the Trustee’s objection, the state court entered a temporary stay of eviction. (*Id.*  
25 at 7,122.) The Trustee then removed the action to the bankruptcy court and filed an  
26 emergency motion to dissolve the temporary stay, which was granted on July 21,  
27 2016. (DER Ex. 147 at 7,012–21; Ex. 150 at 7,254–55.)

1       Appellant and his family were subsequently evicted from the Property. Upon  
2 eviction, the Trustee discovered that various doors and windows had been removed  
3 from the Property; Appellant and Ms. Fraleigh were asked to return these items since  
4 they were part of the bankruptcy Estate and part of the realty being sold pursuant to  
5 the Sale Order. Appellant claims he and Ms. Fraleigh were not involved in the  
6 removal of these fixtures.

7       On August 23, 2016, the bankruptcy court issued an Order to Show Cause as to  
8 why Ms. Fraleigh and her attorney, Mr. Saba—who is also Appellant’s attorney in the  
9 bankruptcy proceeding—should not be held in contempt for knowingly and willfully  
10 violating the automatic stay with their state court filings. (*See* DER Ex. 156 at 7,373–  
11 74.) After reviewing Ms. Fraleigh’s and Mr. Saba’s oppositions to the Order to Show  
12 Cause, the court determined sanctions were appropriate. The court imposed a fine of  
13 \$39,205.49 and dismissed the state court action. (DER Ex. 158 at 7,387–95.)

14       On August 31, 2016, Trustee filed a Complaint against Appellant and Ms.  
15 Fraleigh. (DER Ex. 159 at 7,424–7,942.) In the Complaint, Trustee seeks a judgment  
16 for avoidance and recovery of the unauthorized post-petition transfers pursuant to 11  
17 U.S.C. §§ 549, 550, 551. (*Id.*) The Trustee alleges that the interspousal transfer deed  
18 was improper because it occurred post-petition without the bankruptcy court’s  
19 approval or authorization. (*Id.*) In response, Appellant and Ms. Fraleigh filed a  
20 motion to dismiss the Complaint for failure to state a claim. (*See Simons v. Slaikeh,*  
21 Adv. No. 6:16-ap-01224-MH, Dkt. No. 4.) Thereafter, Ms. Fraleigh withdrew her  
22 initial motion to dismiss and filed a new motion alleging she was not personally  
23 served with the Complaint. (*Id.* at Dkt. Nos. 7, 8.) The bankruptcy court denied both  
24 Appellant’s and Ms. Fraleigh’s motions. (*See id.* at Dkt. Nos. 13, 16.)

25       On December 16, 2016, Appellant and Ms. Fraleigh filed their first counter  
26 complaint against Trustee, alleging: (1) breach of contract; (2) fraud and deceit; (3)  
27 extortion; (4) conversion; (5) defamation, slander *per se*; (6) negligence; (7) breach of  
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1 fiduciary duties; (8) violation of California Business and Professions Code § 17200;  
2 (9) intentional infliction of emotional distress; and, (11) wrongful eviction.  
3 (Appellant’s Excerpts of Record (“AER”) Ex. 1.) Two factual scenarios appear to  
4 form the basis of these claims. First, in May and June of 2016, counsel for Appellant  
5 and Trustee allegedly engaged in negotiations regarding the sale of the Property.  
6 According to Appellant, he offered to purchase the property for \$435,000 and Trustee  
7 counter-offered to sell the property for \$635,000. (AER Ex. 1 at 3.) Appellant  
8 contends he agreed to purchase the property for \$635,000. (*Id.*) Appellant further  
9 argues that Trustee then refused to sell him the Property for that price and demanded  
10 Ms. Fraleigh pay an additional \$75,000 “to teach her a lesson” for filing the state court  
11 action discussed above. (*Id.*; *see also* DER Ex. 164 at 8,051.) The second situation  
12 involved the enforcement of the bankruptcy court’s Sale Order. After Appellant’s  
13 unsuccessful appeal of the Sale Order, an eviction notice was posted on the Property.  
14 Following the determination of Ms. Fraleigh’s state court action, the United States  
15 Marshals Service evicted Appellant and his family. According to Appellant, he was  
16 given thirty minutes to collect personal property, and about a week later, obtained  
17 permission to return and collect additional personal property. (*See* AER Ex. 1 at 7.)  
18 When he returned, he realized certain expensive items were missing. However,  
19 Appellant acknowledged that many doors and windows were missing prior to his  
20 eviction. (*See id.*; *see also* DER Ex. 164 at 8,052–53.)

21 On January 17, 2017, Trustee moved to dismiss the first counter complaint  
22 asserting, among other things, that he and his professionals are entitled to quasi-  
23 judicial immunity for the acts alleged. (DER Ex. 159 at 7,396–8,002.) On January  
24 18, 2017, Ms. Fraleigh voluntarily dismissed her counter complaint. (DER Ex. 164 at  
25 8,050.) The court held a hearing on the motion on February 15, 2017. (*Simons v.*  
26 *Slaikeh*, Adv. No. 6:16-ap-01224-MH, Dkt. No. 35.) Thereafter, on February 24, 2017,  
27 the court dismissed all of Appellant’s claims with prejudice, except for the fifth claim  
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1 for defamation and slander *per se*, which was dismissed without prejudice. (DER Ex.  
2 164.) The court held that all of Appellant’s claims were insufficiently pled, appellant  
3 lacked standing to assert certain claims, and that Trustee and his professionals were  
4 entitled to quasi-judicial immunity with regard to actions taken in relation to the sale  
5 of the Property. (*Id.* at 8,055–63.) The court gave Appellant until March 7, 2017, to  
6 file an amended counter complaint. (*See id.* at 8,048–71; Ex. 165 at 8,072–73.)  
7 Appellant filed his amended counter claims on March 3, 2017, alleging separate  
8 causes of action for slander, defamation, and intentional infliction of emotional  
9 distress. (DER Ex. 166 at 8,633–44.) Trustee subsequently filed a motion to dismiss  
10 the amended counterclaims, which the court granted on June 19, 2017. (DER Ex.  
11 177.) In that order, the court explained that although Appellant had stated a prima  
12 facie claim for slander, the claim was barred by the doctrine of quasi-judicial  
13 immunity. (*Id.* at 8,753–55) Appellant’s defamation claim was dismissed for lack of  
14 standing. As for Appellant’s intentional infliction of emotional distress claim, the  
15 court noted it had already dismissed that claim with prejudice in the prior order. (*Id.*)

16 The bankruptcy court’s June 19 order forms the basis of the instant appeal;  
17 however, Appellant’s Opening Brief also challenges the court’s dismissal of the  
18 causes of action in Appellant’s original counter claim. (*See* Dkt. No. 9, Appellant’s  
19 Opening Brief (“AOB”).) The Court will discuss each of the counterclaims in turn.

20 **II. LEGAL STANDARD**

21 District courts have jurisdiction to hear appeals from, *inter alia*, “final  
22 judgments, order, and decrees” of the bankruptcy courts. 28 U.S.C. §158(a)(1); *see*  
23 also Fed. R. Bankr. P. 8005. “When reviewing a decision of a bankruptcy court, a  
24 district court functions as an appellate court and applies the standards of review  
25 generally applied in federal courts of appeal.” *In re Guadarrama*, 284 B.R. 463, 468  
26 (C.D. Cal. 2002).

27 Appellate courts review *de novo* the grant of a Rule 12(b)(6) motion to dismiss.  
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1        *Knievel v. ESPN*, 393 F.3d 1068, 1072 (9th Cir.2005). “When ruling on a motion to  
2 dismiss, we accept all factual allegations in the complaint as true and construe the  
3 pleadings in the light most favorable to the nonmoving party.” *Id.* “To survive a  
4 motion to dismiss, a complaint must contain sufficient factual matter, accepted as true,  
5 to state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662,  
6 677 (2009) (internal quotations omitted). “A claim has facial plausibility when the  
7 plaintiff pleads factual content that allows the court to draw the reasonable inference  
8 that the defendant is liable for the misconduct alleged.” *Id.*

9        The bankruptcy court’s conclusions of law regarding the immunity of a trustee  
10 are also reviewed de novo, while findings of fact are reviewed for clear error. *In re*  
11 *Jercich*, 238 F.3d 1202, 1205 (9th Cir. 2001).

12        The court generally may not consider materials other than facts alleged in the  
13 complaint and documents that are made a part of the complaint. *Anderson v.*  
14 *Angelone*, 86 F.3d 932, 934 (9th Cir. 1996). However, a court may consider materials  
15 if (1) the authenticity of the materials is not disputed and (2) the plaintiff has alleged  
16 the existence of the materials in the complaint or the complaint “necessarily relies” on  
17 the materials. *Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001) (citation  
18 omitted). The court may also take judicial notice of undisputed facts that are  
19 contained in extrinsic materials. *Mir v. Little Co. of Mary Hosp.*, 844 F.2d 646, 649  
20 (9th Cir. 1988); *Lee*, 250 F.3d at 689–90.

21        **III. DISCUSSION**

22        **A. First Claim for Breach of Contract**

23        In his first claim, Appellant alleges that Trustee breached their contract for sale  
24 when he refused to sell the Property to Appellant. The elements of breach of contract  
25 are (1) the existence of a contract, (2) plaintiff’s performance or excuse for  
26 nonperformance, (3) defendant’s breach, and (4) resulting damages to the Plaintiff.  
27 *Oasis v. West Realty, LLC v. Goldman*, 51 Cal. 4th 811, 821 (2011). Counsel for  
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1 Appellant and Trustee engaged in email correspondence regarding the sale of the  
2 Property, and according to Appellant, the emails establish the existence of a contract.  
3 (See AER Ex. 1 at 3–4.) The Court disagrees. The emails show numerous offers and  
4 counteroffers but do not show acceptance by either party. (DER Ex. 159 at 7,970–  
5 73.)<sup>1</sup> Thus, Appellant has failed to establish the first element of a breach of contract  
6 claim: the existence of a contract.

7 Further, as the bankruptcy court noted, a bankruptcy trustee generally cannot  
8 enter into a valid contract for sale of estate property without court approval. See 11  
9 U.S.C. § 363(b)(1); *In re Smith*, 352 B.R. 500, 503 (Bankr. N.D. Ala. 2006) (holding  
10 that since sale of debtor’s property was not within the ordinary course of business  
11 trustee could not enter into an enforceable contract to sell it without court approval).  
12 Here, a sale of Appellant’s real property would fall outside the ordinary course of  
13 business, and would require court approval. It is undisputed that there was no  
14 approval of the alleged contract to sell the Property to Appellant. Accordingly,  
15 Appellant has not alleged the existence of a contract, and the court **AFFIRMS** the  
16 dismissal of his first cause of action.

## 17           **B. Second Claim for Fraud and Deceit and Third Claim for Extortion**

18 Appellant’s second and third claims stem from certain interactions between  
19 Trustee and Ms. Fraleigh. Trustee claims that Appellant lacks standing to assert these  
20 claims because the alleged harm was to Ms. Fraleigh, not Appellant. (Dkt. No. 12,  
21 Appellee’s Answering Brief (“AB”) at 14–15.) Standing is the threshold question in  
22 every federal case, and a party generally cannot assert the claims of another. *Warth v.*  
23 *Seldin*, 422 U.S. 490, 499 (1975). “A federal court’s jurisdiction therefore can be  
24 invoked only when the plaintiff *himself* has suffered ‘some threatened or actual injury

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<sup>1</sup> The Court considered these exhibits because their authenticity is not disputed,  
27 Appellant has alleged the existence of the emails in the amended cross complaint, and  
28 the amended cross complaint necessarily relies on the emails to establish the contract.  
See *Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001)

1 resulting from the putatively illegal action.”” *Id.* (quoting *Linda R.S. v. Richard D.*,  
2 410 U.S. 614, 617 (1973)) (emphasis added).

3 In his claim for fraud and deceit, Appellant alleges that he and Ms. Fraleigh  
4 were injured when Ms. Fraleigh “had to fly to Canada to liquidate whatever amount of  
5 money in her bank accounts within which to purchase the Property.” (AER Ex. 1 at  
6 5.) Although the factual allegations in the cross complaint refer to actions taken and  
7 money spent by Ms. Fraleigh, Appellant argues in his Opening Brief that because the  
8 couple was married, he has a legal right to claim the expenditure of her trip to Canada  
9 as his own damages. (AOB at 15.)

10 Under California law, the “indispensable elements of a fraud claim include a  
11 false representation, knowledge of its falsity, intent to defraud, justifiable reliance, and  
12 damages.” *Vess v. Ciba-Geigy Corp., USA*, 317 F.3d 1097 (9th Cir. 2003). A cause  
13 of action for fraud “must be pled specifically; general and conclusory allegations do  
14 not suffice.” *Lazar v. Superior Court*, 12 Cal. 4th 631, 645 (1996). “This  
15 particularity requirement necessitates pleading *facts* which show how, when, where, to  
16 whom, and by what means the representations were tendered.” *Stansfield v. Starkey*,  
17 220 Cal. App. 3d 59, 73 (Ct. App. 1990) (emphasis added). Appellant must plead all  
18 of the above requirements as to himself, even if he could ultimately claim he suffered  
19 damages as a result of Ms. Fraleigh’s expenditure of community property. The cross  
20 complaint specifically pleads that Ms. Fraleigh detrimentally relied on the alleged  
21 fraudulent statements; there is no mention of Appellant’s detrimental reliance. (AER  
22 Ex. 1 at 4.) Further, it is unclear from the pleadings how the alleged statement that  
23 Trustee would sell the Property for \$635,000 was false. Indeed, the Court approved  
24 the sale of the Property to another buyer for this amount. (*See* DER Ex. 97 at 3,554.)  
25 Further, the cross complaint ambiguously states that Trustee “knowingly and  
26 intentionally concealed the information” without explaining *what* information was  
27 allegedly concealed. This does not satisfy the specificity requirements for pleading  
28 fraud. Thus, the Court finds that Appellant’s fraud and deceit claim is insufficiently

1 pled, and **AFFIRMS** its dismissal.

2 Similarly, Trustee argues that appellant lacks standing to assert this third claim  
3 for extortion. The amended cross complaint alleges that Trustee demanded *Ms.*  
4 *Fraleigh* pay an additional \$75,000, and as a result, *she* has suffered damages. (AER  
5 Ex. 1 at 6–7.) In his Opening Brief, Appellant does not address the bankruptcy  
6 court’s ruling but merely states that Ms. Fraleigh dismissed her counter claim as a  
7 result of alleged harassment and threats by Trustee. (AOB at 15–16.) There is no  
8 evidence in the record that Trustee or his professionals harassed or threatened Ms.  
9 Fraleigh. Further, even if there was, this does not explain why *Appellant* would be  
10 permitted to assert this claim; he does not allege that he personally suffered an injury  
11 from Trustee’s purported demand that Ms. Fraleigh pay an additional \$75,000 for the  
12 Property. Accordingly, the Court **AFFIRMS** the dismissal of Appellant’s extortion  
13 claim.

14 **C. Fourth Claim for Conversion**

15 In his cross complaint, Appellant states that he returned to his house  
16 approximately one week after he was evicted, only to discover that certain expensive  
17 items of personal property were missing. (AER Ex. 1 at 7.) Appellant argues that  
18 Trustee “failed to ‘board up’ or replace the missing windows and doors to prevent  
19 entry into the Debtor’s Property by outsiders.” (*Id.*) Accordingly, Appellant contends  
20 that Trustee and his professionals intentionally interfered with his personal property,  
21 and such interference deprived Appellant of possession and use of the property at  
22 issue. (*Id.* at 8.)

23 The elements of conversion are (1) the plaintiff’s ownership or right to  
24 possession of the property; (2) the defendant’s conversion by wrongful act  
25 inconsistent with the property rights of the plaintiff, and (3) damages. *In re Emery*,  
26 317 F.3d 1064, 1069 (9th Cir. 2003). Trustee argues that Appellant’s allegation that  
27 Trustee “interfered” with his right to possession is insufficient to state a claim for  
28 conversion. Specifically, Trustee states that Appellant does not allege Trustee

1       converted the property to his own use, but merely that he “failed to board up” the  
2       house after the eviction, which led to the loss of Appellant’s personal property.  
3       Further, Trustee claims that there was no wrongful act by Trustee since the eviction  
4       was pursuant to the Sale Order.

5       Plaintiff’s allegations are insufficient to state a claim for conversion. Appellant  
6       does not allege that Trustee exercised control over the personal property or applied it  
7       to his own use. Indeed, the cross complaint alleges that the property was stolen by  
8       outsiders, revealing that Trustee did not apply the personal property to his own use.  
9       (AER Ex. 1 at 7.) Further, the Sale Order authorized Trustee to evict Appellant and  
10      other occupants if still present after June 7, 2016, and authorized the Trustee to move  
11      personal property to a moving truck. (DER Ex. 129 at 4,691–92.) Thus, any exercise  
12      of control over the Property by way of eviction, or over Appellant’s personal property  
13      if moved into a moving truck, would not have been wrongful. Regardless, it does not  
14      appear that Trustee actually assumed control or ownership over Appellant’s personal  
15      property, since the option to hire a moving truck was not exercised. Neither does  
16      failing to board up the missing windows and doors constitute a “wrongful act” by  
17      Trustee. The windows and doors were missing prior to Appellant’s eviction, and  
18      Appellant advances no support for his contention that Trustee should have improved  
19      the Property by making such replacements following the eviction. Accordingly, the  
20      Court **AFFIRMS** the dismissal of Appellant’s conversion claim.

21                  **D. Appellant’s Slander and Defamation Claims**

22       Appellant asserted a claim for defamation and slander per se as his fifth claim  
23       for relief in his original counter claim. (AER Ex. 1 at 8.) This claim was dismissed  
24       without prejudice, and Plaintiff’s amended counter claim asserted slander and  
25       defamation as the first and second claims, respectively. (*See Simons v. Slaikeh*, Adv.  
26       No. 6:16-ap-01224-MH, Dkt. No. 39.) To prevail in a defamation claim under  
27       California law, a plaintiff must allege “(a) a publication that is (b) false, (c)  
28       defamatory, and (d) unprivileged, and that (e) has a natural tendency to injure or that

1 causes special damage.” *Bowen v. McCaratan, Inc.*, 142 F. Supp. 3d 1007 (E.D. Cal.  
2 2015). “Publication means communication to a third person who understands the  
3 defamatory meaning of the statement and its application to the person to whom  
4 reference is made.” *Arikat v. JP Morgan Chase*, 430 F. Supp. 2d 1013, 1020 (N.D.  
5 Cal. 2006). Similarly, Slander is a false and unprivileged publication, orally uttered  
6 which—as relevant here—charges any person with a crime, or with having been  
7 indicted, convicted, or punished for a crime. *See* Cal. Civ. Code § 46 (1945).

8 The bankruptcy court originally dismissed Appellant’s defamation and slander  
9 claim because he failed to plead publication. (DER Ex. 164 at 8,058.) Although  
10 Appellant’s amended counter claim cured the pleading defect as to the slander claim,  
11 the court found that Trustee was entitled to quasi-judicial immunity for this claim.  
12 (DER Ex. 177 at 8,752–54.) The court also held that Appellant did not have standing  
13 to assert his second defamation claim, which appeared to be based on slander of Ms.  
14 Fraleigh. (*Id.* at 8,752.)

15 “Bankruptcy trustees are entitled to broad immunity from suit when acting  
16 within the scope of their authority and pursuant to a court order.” *In re Harris*, 590  
17 F.3d 730, 742 (9th Cir. 2009). “Additionally, court appointed officers who represent  
18 the estate are the functional equivalent of a trustee.” *Id.* For quasi-judicial immunity  
19 to apply, the defendants must show: (1) their acts were within the scope of their  
20 authority; (2) the debtor had notice of their proposed acts; (3) they candidly disclosed  
21 their proposed acts to the bankruptcy court; and, (4) the bankruptcy court approved  
22 their acts. *Id.*; *see also In re Jacksen*, 105 B.R. 542, 545 (B.A.P. 9th Cir. 1989)  
23 (holding a trustee has immunity for actions “within the scope of the authority  
24 conferred upon him by statute or the court”).

25 Trustee asserts immunity under the theory that bankruptcy trustees are entitled  
26 to quasi-judicial immunity for actions that are integrally related to the adjudication of  
27 the bankruptcy case. *Lonneker Farms, Inc. v. Klobucher*, 804 F.2d 1096, 1097 (9th  
28 Cir. 1986) (“[A] trustee in bankruptcy . . . is entitled to derived judicial immunity

1 because he is performing an integral part of the judicial process.”). Appellant argues  
2 that the Supreme Court’s decision in *Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429  
3 (1993), redirects our inquiry away from whether actions performed by nonjudicial  
4 officers are integrally related to the judicial process to an examination of the nature of  
5 those functions. Appellant contends that the trustee is only immune for actions that  
6 are functionally comparable to those of judges, i.e., those functions that involve  
7 discretionary judgment. *Antoine*, 508 U.S. at 436. Appellant concedes that a  
8 bankruptcy trustee would enjoy absolute quasi-judicial immunity for judicial functions  
9 involving the exercise of discretionary judgment, but argues that the acts performed  
10 here were extraneous to and not “in any way related to the judicial process.” (AOB at  
11 35.) Trustee, as the proponent of the claim of immunity, bears the burden of  
12 establishing that such immunity is justified. *Antoine*, 508 U.S. at 432.

13 All four elements required to establish quasi-judicial immunity are satisfied  
14 here. First, as the bankruptcy court noted, all of Trustee’s actions related to the sale of  
15 the Property and Appellant’s eviction were within the scope of Trustee’s duties. One  
16 of Trustee’s primary duties under 11 U.S.C. § 704(a)(1), is to “collect and reduce to  
17 money the property of the estate for which the trustee serves.” Accordingly, Trustee’s  
18 attempt to sell the Property pursuant to the Sale Order was within the scope of his  
19 statutorily conferred authority as trustee. Additionally, the Sale Order authorized  
20 Appellant’s eviction, and therefore, any acts by Trustee in an attempt to evict  
21 Appellant would also be within the scope of his authority. The allegedly defamatory  
22 statements were made by Trustee and his professionals in their effort to evict  
23 Appellant and effectuate the Sale Order. Inquiry regarding missing Estate property—  
24 the windows and doors—was proper given Trustee’s duty to be accountable for all  
25 property received. *See* 11 U.S.C. § 704; *see also In re Cedar Funding, Inc.*, 419 B.R.  
26 807, 822 (B.A.P. 9th Cir. 2009) (holding that trustee was immune from claim for  
27 slander where allegedly defamatory statements were made while performing his  
28 official statutory duties). As the bankruptcy court stated, “[h]ere, the allegedly

1 defamatory statements were made in direct response to the disappearance of estate  
2 property, the sale of which had been authorized pursuant to Court order, and the  
3 disappearance of which was the sole responsibility of the Trustee to investigate.”  
4 (DER Ex. 177 at 8,754.) Thus, the first element is satisfied.

5 Second, Appellant clearly had notice of Sale Order and pending eviction.  
6 Appellant opposed and attempted to appeal the Sale Oder, and was given notice of the  
7 eviction via the Sale Order and the eviction notice posted on the property. To the  
8 third and fourth elements, Trustee candidly disclosed to the bankruptcy court its  
9 proposed actions and the court approved and issued the Sale Order. Therefore, all  
10 four elements are satisfied. Accordingly, because the Court finds that all four  
11 requirements are met, and that the statements at issue were made during Trustee’s  
12 attempt to prosecute the Sale Order—an act “essential to the authoritative adjudication  
13 of private rights to the bankruptcy estate”—it **AFFIRMS** the dismissal of Appellant’s  
14 defamation and slander claims on quasi-judicial immunity grounds. *See In re  
15 Castillo*, 297 F.3d 940, 951 (9th Cir. 2002).

#### 16       **E. Appellant’s Sixth Claim for Negligence**

17 With this claim, Appellant argues that Trustee’s failure to board up the missing  
18 windows and doors constituted negligence. (AER Ex. 1 at 9.) In California, the  
19 elements of negligence are (1) a legal duty to use due care, (2) breach of that duty, and  
20 (3) the breach as the proximate or legal cause of the resulting injury. *Ladd v. Cnty. of  
21 San Mateo*, 12 Cal. 4th 913, 917 (1996.) The bankruptcy court dismissed this claim  
22 on the grounds that Appellant cited no authority for his proposition that Trustee owed  
23 him a duty to replace windows and doors following the eviction, and because the only  
24 damages alleged are to Ms. Fraleigh. (DER Ex. 164 at 8,059; *see also* AER Ex. 1 at  
25 10)

26 First, Trustee argues that his duties under 11 U.S.C. §§ 323(a) and 704 are to  
27 the Estate, not to Appellant. (AB at 24.) On the other hand, Appellant contends that  
28 because Trustee was the owner of the real Property, he had a duty to protect the

1 personal property left inside the home. (AOB at 23.) Appellant also asserts that  
2 Trustee had a duty to be accountable for all property *received*, and as a beneficiary of  
3 the Estate, Appellant was owed this duty. (*Id.*)

4 First, the Court notes that the only damages alleged in the counter complaint are  
5 Ms. Fraleigh's damages. As explained above, Appellant lacks standing to assert Ms.  
6 Fraleigh's claims. But, even assuming Appellant's allegations can be construed as  
7 pleading his own damages, Appellant has failed to show that Trustee owed him a duty  
8 to "board up" the Property. A trustee is charged primarily with conserving estate  
9 assets and maximizing distributions to creditors. *See In re Rigden*, 795 F.2d 727, 730  
10 (9th Cir. 1986.) "When a debtor retains an interest in estate assets—either by properly  
11 claiming exemptions or because surplus property will remain in the estate after all  
12 creditors have been compensated—the trustee owes a fiduciary duty to the debtor as  
13 well." *Wisdom v. Gugino*, 649 Fed. App'x 583, 584 (9th Cir. 2016) (citing U.S. Dep't  
14 of Justice, Executive Office for the United States Trustees, *Handbook for Chapter 7*  
15 *Trustees* 4–2 (2012)). First, the personal property Appellant complains was stolen  
16 was not part of the Estate. Thus, Trustee never assumed control over, or "received"  
17 this property as part of the Estate. Contrary to Appellant's contention, the Sale Order  
18 does not state that Trustee *should* rent a U-Haul to remove personal property; as noted  
19 above, the order merely authorized Trustee to do so in order to effectuate the eviction.  
20 (DER Ex. 129 at 4,691–92.) Accordingly, even if Trustee owed Appellant a fiduciary  
21 duty in this case, it was as to his interest in surplus *estate* property, not as to personal  
22 property abandoned following eviction. Therefore, the Court **AFFIRMS** the  
23 dismissal of Appellant's negligence claim.

24 **F. Appellant's Seventh Claim for Breach of Fiduciary Duty**

25 A claim for breach of fiduciary duty requires the following elements be shown:  
26 (1) existence of a fiduciary duty; (2) breach of the fiduciary duty; and (3) damages.  
27 *Gutierrez v. Girardi*, 194 Cal. App. 4th 925, 932 (Ct. App. 2011). As noted above,  
28 bankruptcy trustees do owe fiduciary duties to the estate and creditors, and in some

1 situations, to the debtor. *See also In re Stoll*, 252 B.R. 492, 495 (B.A.P. 9th Cir.  
2 2000). Here, Appellant asserts that Trustee and his professionals breached their  
3 fiduciary duties “by doing all of the acts and omissions herein alleged.” (AOB at 10.)

4 First, to the extent Appellant is attempting to assert this claim on behalf of Ms.  
5 Fraleigh and the estate, the claim fails for lack of standing. *See In re Stoll*, 252 B.R. at  
6 495 (“Only a trustee may pursue a cause of action belonging to the bankruptcy  
7 estate.”) Thus, to plead breach of fiduciary duty, Appellant must first assert facts  
8 sufficient to show *he* was owed a duty by Trustee. Appellant has failed to do so.  
9 Appellant has not pleaded that he retained an interest in estate assets or that there  
10 would be surplus property after all creditor’s claims were satisfied. Further, section  
11 704 does not contain the extensive duties Appellant claims are owed to him and Ms.  
12 Fraleigh. (*See AER Ex. 1 at 10* (stating that trustee “owed cross-claimants a fiduciary  
13 duty to act at all times in good faith and in [their] best interest” and had a duty “to act  
14 in Ms. Fraleigh’s highest best interests at all times”).) Even assuming the general  
15 allegations in the amended cross complaint are sufficient to establish the existence of  
16 a fiduciary duty, Appellant has not properly pleaded breach. The unclear statement  
17 that Trustee breached his duty by committing all acts alleged in the cross complaint is  
18 insufficient given that none of Appellant’s other claims are sufficiently pled.  
19 Moreover, Appellant has not explained how any of these alleged acts would result in a  
20 breach of the fiduciary duties owed specifically to him as a debtor, and not to the  
21 estate generally. Accordingly, the Court **AFFIRMS** the dismissal of Appellant’s  
22 breach of fiduciary duty claim.

23 **G. Appellant’s Eighth Claim for Violation of California Business and  
24 Professions Code Section 17200**

25 California Business and Professions Code section 17200 states:

26 As used in this chapter, unfair competition shall mean and include any  
27 unlawful, unfair or fraudulent business act or practice and unfair deceptive,  
28 untrue or misleading advertising and any act prohibited by Chapter 1

(commencing with Section 17500) of Part 3 of Division 7 of the Business and Professions Code.

In his amended cross complaint, Appellant again contends that the “acts alleged herein” including “(a) Breach of Contract, (b) Extortion; (c) Conversion; (d) breach of fiduciary duties, (e) Breach of B & P Code section 17200, et seq.; and (f) Negligence” form the basis of this claim. (AER Ex. 1 at 12.)

The bankruptcy court found this claim “redundant in that [Appellant] argues that the other causes of action form the basis for this cause of action.” (DER Ex. 164 at 8,061.) The court also noted that the causes of action relied upon lacked merit or were barred by Trustee’s quasi-judicial immunity, and the actions allegedly committed by Trustee “are not plausibly considered a ‘business act or practice’ within the meaning of the statute.” (*Id.*) In his Opening Brief, Appellant again asserts that the above-listed claims form the basis of this claim.

In *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.*, 20 Cal. 4th 163, 182 (1999), the court warned that that the breadth of § 17200 does not give a plaintiff license to “plead around” the absolute bars to relief contained in other possible causes of action by recasting those causes of action as ones for unfair competition. This is what Appellant has attempted to do with his section 17200 claim. Since all of his other claims against Trustee cannot proceed due to substantial pleading, standing, or immunity issues, the same allegations cannot form the basis of an unfair competition claim.

Further, “a common law violation such as breach of contract is insufficient” on its own to support a claim under the unlawful prong of section 17200. *Shroyer v. New Cingular Wireless Servs.*, 622 F.3d 1035, 1044 (9th Cir. 2010). Thus, the allegations advanced by Appellant that are based on common law violations are insufficient to support a finding of unlawfulness, and the only statutory causes of action alleged are extortion and defamation. As analyzed above, these claims fail for lack of standing or because of Trustee’s quasi-judicial immunity. Accordingly, Appellant cannot attempt

1 to recast those insufficient allegations as a claim under section 17200.

2 Lastly, the amended cross complaint lacks allegations to support the conclusion  
3 that the alleged conduct was unfair or fraudulent. California Courts of Appeal are  
4 split as to the test for what constitutes an unfair business practice. *See Drum v. San*  
5 *Fernando Valley Bar Ass'n*, 182 Cal. App. 4th 247 (Ct. App. 2010) (internal citations  
6 omitted) (describing three tests courts use when analyzing the unfair prong in actions  
7 involving consumers). In his amended cross complaint, Appellant states that Trustee  
8 engaged in deceptive practices with respect to the administration of the Estate and  
9 conspired to defraud Appellant. (AER Ex. 1 at 12.) However, Appellant does not  
10 assert any specific allegations with respect to how Trustee's administration of the  
11 Estate was unlawful, unfair, or fraudulent. Trustee's act of marketing the property for  
12 sale and evicting Appellant was done pursuant to the Sale Order and was not unlawful  
13 or unfair. As to whether the acts were fraudulent, Appellant essentially relies on the  
14 allegations in his other claims. *See Grant v. Pensco Tr. Co.*, No. 12-cv-06084-WHO,  
15 2014 WL 1471054, at \*6 (N.D. Cal. Apr. 15, 2014) (granting motion to dismiss UCL  
16 claim when plaintiff did not include any specific allegations regarding the unfair  
17 prong and simply incorporated breach of contract allegations); *Bank of the West v.*  
18 *Superior Court*, 2 Cal. 4th 1254, 1267 (1992) (noting that fraudulent conduct  
19 "requires a showing [that] members of the public 'are likely to be deceived'"). These  
20 allegations are insufficient to state a claim under section 17200.

21 Accordingly, the Court **AFFIRMS** the dismissal of Appellant's section 17200  
22 claim.

23 **H. Appellant's Ninth Claim for Intentional Infliction of Emotional Distress**

24 A cause of action for intentional infliction of emotional distress ("IIED") exists  
25 where there is "(1) extreme and outrageous conduct by the defendant with the  
26 intention of causing, or reckless disregard of the probability of causing, emotional  
27 distress, (2) the plaintiff's suffering severe or extreme emotional distress; and (3)  
28 actual and proximate causation of the emotional distress by the defendant's

1       outrageous conduct.” *Hughes v. Pair*, 46 Cal. 4th 1035, 1050 (2009). Appellant  
2       asserts that Trustee’s alleged fraud, extortion and defamation was extreme and  
3       outrageous, done intentionally, and caused him and his family to suffer severe  
4       emotional distress. (AER Ex. 1 at 14–15; AOB at 32.) Specifically, Appellant alleges  
5       that Trustee should have known that refusing to comply with the alleged purchase  
6       agreement would likely cause severe emotional distress. (AER Ex. 1 at 15.) Trustee  
7       argues Appellant lacks standing to assert this claim because the allegations concern  
8       Ms. Fraleigh’s alleged distress. (AB at 29.)

9           Under California law, an action must be intentional or reckless to serve as the  
10          basis for an intentional infliction of emotional distress claim. It is not enough to  
11          simply allege inaction on the part of the defendant. *See Spackman v. Good*, 245 Cal.  
12          App. 2d 518, 530 (1966). Since Appellant’s claims for conversion, breach of  
13          fiduciary duty, and negligence are all based on the alleged failure to board up the  
14          Property, the allegations supporting these causes of action cannot serve as the basis for  
15          his IIED claim. Appellant has failed to allege facts to show that any of the other  
16          alleged wrongs, i.e., breach of contract, slander, or extortion, were done in order to  
17          cause, or with reckless disregard for the possibility of causing, severe emotional  
18          distress. Indeed, the alleged defamatory statements were geared at discovering  
19          information relating to missing Estate property. As to the alleged act of extortion,  
20          Appellant has failed to provide facts that show Trustee extorted Ms. Fraleigh with the  
21          intent of causing *Appellant* severe emotional distress; indeed, it is not clear that  
22          Appellant was even present when the alleged demand was made. Lastly, there are no  
23          facts relating to the alleged breach of contract that show that it was done to cause  
24          severe emotional distress or with reckless disregard thereto.

25           Further, for conduct to be outrageous, it must be “so extreme as to exceed all  
26          bounds of that usually tolerated in a civil society.” *King v. AC & R Advertising*, 65  
27          F.3d 764, 769 (9th Cir. 1995). Basically, Appellant contends that it was outrageous of  
28          Trustee to engage in the other alleged wrongs. However, Appellant’s allegations are

1 insufficient in that they do not state what specific acts were outrageous under this  
2 standard. Accordingly, the Court **AFFIRMS** the dismissal of Appellant's IIED claim.

3 **I. Appellant's Tenth Claim for Wrongful Eviction**

4 Lastly, Appellant argues that he was wrongfully evicted because Trustee did not  
5 follow state eviction laws. (AER Ex. 1 at 16.) However, as the bankruptcy court  
6 noted, state eviction laws do not apply after a bankruptcy court enters an order  
7 directing surrender of the property. *See George v. Cnty. of San Luis Obispo*, 78 Cal.  
8 App. 4th 1048 (Ct. App. 2000) (“State unlawful detainer law does not apply, and the  
9 state must defer to the federal order of the bankruptcy court directing immediate  
10 surrender of the premises.”) Accordingly, this claim was properly dismissed.

11 Appellant also alleged that the order to sell the Property was based on fraud and  
12 misrepresentation by Trustee. However, Appellant provides no factual allegations  
13 with respect to what conduct Trustee engaged in procuring the Sale Order. Moreover,  
14 Appellant was unsuccessful in his attempt to appeal the Sale Order, and cannot use  
15 these bare allegations in an effort to collaterally attack that outcome. Lastly, based on  
16 the above analysis of Trustee’s quasi-judicial immunity, Trustee is immune from this  
17 claim as the eviction was within the scope of Trustee’s duties, was disclosed to  
18 Appellant and the court, and approved by the court. *See infra* Section III.E. Thus, the  
19 Court **AFFIRMS** the dismissal of Appellant’s wrongful eviction claim.

20 **J. Dismissal With Prejudice**

21 Lastly, the Court finds dismissal with prejudice was appropriate. Leave to  
22 amend may be denied where there has been a repeated failure to cure the deficiencies  
23 by amendment previously allowed, or where amendment would be futile. *See Forman*  
24 *v. Davis*, 371 U.S. 178, 182 (1962). Here, it would have been futile to allow  
25 Appellant leave to amend claims for which he lacked standing, and from which  
26 Trustee is immune. Thus, Appellants extortion, defamation, and wrongful eviction  
27 claims were properly dismissed without leave to amend. As to the remaining claims,  
28 Appellant had multiple opportunities to present these claims, and he continually failed

1 to state a prima facie case. (*See* DER Ex. 164 at 8,064.) For these reasons, dismissal  
2 with prejudice was appropriate.

3 **IV. CONCLUSION**

4 For the foregoing reasons, the Court **AFFIRMS** the bankruptcy court's order  
5 dismissing with prejudice Appellant's counter claims.

6 **IT IS SO ORDERED.**

7  
8 Dated: January 16, 2018  
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10 HONORABLE ANDRÉ BIROTTE JR.  
11 UNITED STATES DISTRICT COURT JUDGE  
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13 CC: Bankruptcy Court and BAP  
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